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No. 84-1171

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JOHN W. JENRETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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In a case laying bare the most serious dangers to our constitutional structure of separated and independent powers of the Executive and the Congress, the

best the Government can do in its Opposition is to run away from our Petition for Certiorari on the law and to mislead this Court grievously on the facts.

1. The Government suggests no legal standard by which to determine and prevent outrageous actions in violation of due process against members of Congress by undercover agents of the Executive. The Court below has interpreted this Court's silence on the issue of outrageousness as indicating that "due process guarantees are violated only in the narrow category of cases where the challenged conduct includes 'coercion, violence or brutality to the person.'" See Pet. 14. But, as we pointed out, id., neither precedent nor rational argument supports restricting "outrageousness" to physical action by the confidence men or the law enforcement officials. The Court

will look through the Government's Opposition in vain for any response or even reference to this vitally important legal issue lying at the heart of this case.

Obviously, the Government recognizes that it cannot defend the "physical" standard of outrageousness adopted by the Court below and recognizes equally that, if it were to propose a different standard, this conflict between the Government and the Court of Appeals would impel this Court to grant certiorari to examine the issue. So, instead of meeting petitioner's legal argument, the Government simply assumes that the Court will overlook its failure either to support the standard adopted below or to offer some semblance of an alternative.*

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* The Government's evasive position is all the more irresponsible here, coming as it does in the face of admitted

The Government's present posture concerning due process violations in Abscam-type cases can only be deemed "lawless," in the literal sense that there is now no law that the Government will defend, for determining the validity of conduct in executive undercover activities against Members of Congress. In the delicate area of Executive-Congressional relationships, a vacuum of this kind threatens the very separation of powers upon which our Constitution was built. The Executive apparently seeks to retain this lawless state of affairs; we most respectfully submit that this Court cannot permit it to continue.

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confusion among the lower courts which have considered the "elusive" standard now governing the "outrageousness/due process" defense and the special plea for "further Supreme Court elaboration" made by Judges Ginsburg and Robinson in the Kelly decision. See Pet. 17-18.

2. Unable to defend the proposition that the Executive may, without any basis for suspicion, pursue and test the moral fiber of a Member of Congress, the Government attempts to mislead the Court on the facts. It begins by misstating the "Question Presented," premising it upon "the government's investigation of petitioner ...." But there was no "investigation" of petitioner, only pursuit and seduction.

The District Court specifically found that the Government was conducting a "test of the integrity and moral fiber of a member of Congress," seeking to determine "whether an elected government official could be induced to commit a crime by a convicted professional con man." Pet. 60a. The FBI "pursu[ed] Jenrette for a period of at least seven months ... without even a reasonable

suspicion that he could be induced to accept the bribe." Id. 38a.*

In the face of these and other District Court findings directly to the contrary, Pet. 38a, 39a, 60a, 64-65a, JA II 699-700, 701, 702, the Government contends that its agents did not "target" or "test" or "pursue" petitioner, and seeks to manufacture a post hoc justification for actions of its agents. Opp. 5. But the Government's contention hangs on two false premises. First, the Government

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* This case thus differs from previous Abscam cases, where the Government could argue that its agents had proceeded on the basis of definite and specific information that the Members of Congress in question were willing to engage in corrupt actions and "jumped at the chance" to do so. See the Government's Opposition to petitions for certiorari in Lederer, 82-1183; Thompson, 82-1199; Myers, 82-1255; and Williams, No. 83-256; United States v. Myers, 692 F.2d 823 (2d Cir. 1982); United States v. Williams, 705 F.2d 603 (2d Cir. 1983). Other Abscam cases cited by the Government (Jannotti, Silvestri and Weisz) did not involve Congressmen.

alleges that in a taped October 1978 telephone conversation, Stowe told Weinberg that he believed "certain difficulties could be overcome because 'my contact is a Congressman.'" Opp. 2. But Stowe never said this. The only "difficulty" mentioned is Stowe's problem in contacting his busy Congressman. JA III 916. Second, the Government makes much of a joking remark by Stowe much later in the same conversation -- "He's as big a crook as I am. (Laughing)." Opp. 2,5.* Weinberg never even asked petitioner what he meant by either statement, and neither he nor the FBI agents working with Weinberg made the slightest effort to follow up on either the "contact" or "crook" aspect of the conversation. Thirteen months elapsed

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* The Government, in quoting the transcript of this tape recorded conversation, Opp. 2, crops the word "Laughing." See JA III 919.

between that Weinberg-Stowe conversation and the bribe offer -- all without the least suggestion that petitioner would be willing to commit any impropriety. See JA III 887-947.*

Actually, the FBI agent in charge of this matter admitted that he decided to go after petitioner merely because "it was a loose end that had to be clarified to the best of our ability prior to the conclusion of the covert stages ...." JA II 515. The bribe offer was extended merely "to call Mr. Stowe's bluff" by asking him to set up a meeting with Jenrette. JA II 306. Finally, the Abscam tapes demonstrate, and agent Amoroso admitted, that the Government agents had no infor-

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* The Government's use of the word "then" to imply immediacy (ten lines from the bottom on p. 5) when the time differential was thirteen months, is a deception not worthy of the United States, but consistent with cropping the word "Laughing" from a transcript.

mation that petitioner was willing to commit any illegal act. Pet. 7-8; JA III 887-952, 710-33. Bluntly put, the Government is fabricating a basis for pursuing petitioner with its bribe offer.*

3. In its desperate effort to divert the Court's attention from the dangers inherent in undercover activities against Congressmen, implemented with no standard or law to govern the agents'

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* The true facts concerning the lengthy pursuit of petitioner are simply omitted from the Government's Opposition. Thus there is no mention in the Opposition that in early October 1978 with nothing to go on except petitioner's drinking problem, convicted confidence man Weinberg called petitioner's constituent Jack Morris, who was charged with securities forgery, and suggested that Morris involve petitioner in his criminal problems -- because "'he's a lush anyhow. Give him a few drinks and he'd do anything.'" Pet. 5-6. Morris refused. Nor does the Opposition recount Weinberg's second unsuccessful effort to corrupt petitioner, when later that month, through Stowe, he sought to involve Jenrette in a plan to smuggle certificates of deposit into the United States. Now it was petitioner who said no. Id. at 6.

conduct, the Government stresses throughout the Opposition, twice in the very last two sentences, petitioner's "willingness" to accept a bribe. Pet. 5-8. But "willingness" goes to predisposition and entrapment; it has nothing to do with Executive misconduct in violation of due process. And, in this case "willingness" is a red herring, for Weinberg consciously exploited Jenrette's personal weaknesses, pursuing the Congressman for months before ultimately consummating his seduction. Pet. 5-8. The government seeks to shift the Court's attention from the basic threat of such Executive misconduct against the Congressional Branch to a point -- entrapment -- nowhere raised in the petition.

The Government's implication that "willingness" after the fact would somehow excuse the unrestrained misconduct of

its undercover agents in their efforts to corrupt a Member of Congress highlights the dangerous "anything goes" precedent set by the decision below and underscores the urgent need for review by this Court.

In conclusion, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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